

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

DELAWARE INSTITUTE OF )  
HEALTH SCIENCES, INC., ) C.A. No. 10A-08-001 JTV  
)  
Appellant, )  
)  
v. )  
)  
DELAWARE STATE BOARD )  
OF NURSING, )  
)  
Appellee. )

*Submitted: September 19, 2011*

*Decided: October 21, 2011*

Laraine A. Ryan, Esq., Wilmington, Delaware. Attorney for Appellant.

Patricia Davis Oliva, Esq., Department of Justice, Dover, Delaware. Attorney for Appellee.

*Upon Consideration of Appellant's  
Motion For Stay Pending  
Appeal to the Delaware Supreme Court*

**DENIED**

**VAUGHN, President Judge**

**ORDER**

Upon consideration of the appellant's Motion For Stay Pending Appeal to the Delaware Supreme Court, the appellee's response, and the record of the case, it appears that:

1. Appellant has operated a Delaware nursing education program. Pursuant to 24 *Del. C.* § 1919(b), if a nursing program "is not maintaining the standards required by this chapter and by the Board, written notice thereof, specifying the deficiency and the time within which the same shall be corrected, shall immediately be given to the program." On August 29, 2009, the State Board of Nursing sent a notice of deficiency outlining five areas in which the school was not in compliance, with a time line to cure them. Appellant failed to cure all of the deficiencies within the time line. Following a hearing, the Board withdrew the school's approved status. Appellant appealed and this Court affirmed the Board.<sup>1</sup> Appellant has appealed this Court's decision to the Delaware Supreme Court and seeks a stay of enforcement of the decision during the pendency of the appeal.

2. Delaware Supreme Court Rule 32(a) states as follows regarding stays:

A motion for stay must be filed in the trial court in the first instance. The trial court retains jurisdiction over the initial motion and must rule on the initial motion regardless of whether the case is on appeal to this Court. A stay or an injunction pending appeal may be granted or denied in the

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<sup>1</sup> *Del. Inst. Of Health Scis., Inc. v. Del. State Bd. of Nursing*, 2011 WL 3247798, at \*5 (Del. Super. July 29, 2011).

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discretion of the trial court, whose decision shall be reviewable by this Court. The trial court or this Court, as a condition of granting or continuing a stay or an injunction pending appeal, may impose such terms and conditions, in addition to the requirement of indemnity, as may appear appropriate in the circumstances.<sup>2</sup>

3. The appellant contends that it is likely to succeed on appeal because the substantive legal issues have not been addressed; that the Supreme Court is likely to remand the case to require the Board to make factual findings—including which faculty members did not have proper experience; that the issue surrounding internet access was not properly decided; that irreparable harm exists because a gap in its program will harm its reputation and inconvenience its students; that the appellee will not be harmed if a stay is granted because it still would give the Licensing Exam to graduates; and that the public interest will not be harmed because a nurse must still pass the Licensing Exam.

4. Appellee contends that appellant has simply restated the same issues it raised in its appeal to this Court; that no irreparable harm will result because business reputation is not a type of public harm contemplated by the Administrative Procedures Act (“APA”); and that irreparable harm could result if appellants are permitted to continue their studies at a non-compliant program.

5. The Delaware Supreme Court has held that a “reasonable approach to

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<sup>2</sup> Supr. Ct. R. 32(a).

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this issue is to balance all of the equities involved in the case together.”<sup>3</sup> The four-prong *Evans v. Buchanan* test requires the reviewing court to:

(1) make a preliminary assessment of likelihood of success on the merits of the appeal; (2) assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) determine whether the public interest will be harmed if the stay is granted.<sup>4</sup>

6. I am not persuaded that the appellant has presented a likelihood that it will succeed on the merits. “A party must do more than simply outline the issues before the Court on appeal to establish a reasonable probability of success.”<sup>5</sup> The alleged errors and findings are opinion based at best. It does not appear that there are issues of law or fact brought to light that would create a likelihood of success on appeal. All of appellant’s contentions were considered in the original appeal.<sup>6</sup> I am not persuaded that the appellant has set forth substantial issues, such as misinterpretations or errors, that preliminarily create a likelihood of success.<sup>7</sup>

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<sup>3</sup> *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 358 (Del. 1998).

<sup>4</sup> *Id.* at 357 (citing *Evans v. Buchanan*, 435 F. Supp. 832, 841-42 (D. Del. 1977)).

<sup>5</sup> *State Dept. of Transp. v. Keeler*, 2010 WL 334920, at \*1 (Del. Super. Jan. 28, 2010).

<sup>6</sup> *See in re the License of Earl E. Ford*, 1990 WL 81889 (Del. Super. May 30, 1990).

<sup>7</sup> *See Delmarva Pwr. & Light Co. v. Pub. Serv. Comm’n of State*, 1997 WL 855702, at \*5 (Del. Super Dec. 22, 1997).

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7. I also conclude that irreparable harm will not be suffered if the stay is denied. Irreparable harm must constitute more than just the “undesirable consequence” of the lapse of licensure.<sup>8</sup> When a utility company argued that compliance with an order during appeal “might annoy potential customers causing them to turn away and perhaps go to a competitor,” this Court found that such an argument was not enough to establish irreparable harm.<sup>9</sup> I conclude that suffering a gap in its program which would negatively affect its reputation and inconvenience current students is a consequence of a lapse of licensure and not irreparable harm.

8. Next, I conclude that there will be substantial harm to interested parties, specifically nursing students at the program, if the appellants are allowed to operate a non-compliant nursing program. The graduates are unprepared for the Licensing Exam in that only 28% of the students passed the exam in 2007, while the program continues to collect tuition money.

9. Finally, I am satisfied that the public interest will be harmed if the stay is granted. The general public has an interest in being assured that a nursing program satisfies the Board’s standards; and, as mentioned, the nursing students will be harmed by pursuing nursing studies at a program which is failing to prepare them for success. Furthermore, this fourth factor is outweighed by the previous three. Taking all of the considerations together, they do not support granting a stay of this Court’s

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<sup>8</sup> *Munir v. Del. Examining Bd. Of Physical Therapy*, 1999 WL 458800, at \*1 (Del. Super. May 25, 1999).

<sup>9</sup> *Delmarva Pwr. & Light*, 1997 WL 855702, at \*5.

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decision.

10. For the aforementioned reasons, Appellant's Motion For Stay Pending appeal is **denied**.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File